



## Revised HCP Public Comments

Appendix B provides written public comments (including agencies, non-governmental organizations, businesses, and individuals) on the revised HCPs that were received in response to Federal Register Notice, 67 Fed. Reg. 42,755, on June 25, 2002. Substantive comments in each letter are marked and numbered.

Following each letter containing substantive comments is a table directing the reader to the specific NMFS numbered response in Appendix C.

The letters in this appendix are organized in alphabetical order. Refer to the Table of Contents below for the location of specific letters within this appendix.

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July 26, 2002

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Northwest Region  
Hydro Program  
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Sent via facsimile (503) 231-2318

Re: Incidental Take Permits 1391, 1392, and 1393 with Habitat Conservation Plans

Dear Mr. Graves:

On June 25, 2002, the Department of Commerce, National Oceanic and Atmospheric Administration published notice of applications for Incidental Take Permits 1391, 1392, and 1393 with Habitat Conservation Plans. (67 Fed. Reg. 42755). American Rivers appreciates the opportunity to comment on the applications.

As stated in the Notice, NMFS previously issued and received public comment on its Draft Environmental Impact Statement, which evaluated an earlier version of the Anadromous Fish Agreements and Habitat Conservation Plans. American Rivers submitted comments on the DEIS (May 1, 2001), which we incorporate by reference herein.

The hydropower projects at issue have played a significant role in the decline of anadromous fish populations in the Columbia River basin, several of which are now listed under the Endangered Species Act. American Rivers' involvement at various stages in the development of long-term anadromous fish protection plans for the three hydropower projects was intended to ensure that any alternative that allows continued project operations would (1) promote recovery of ESA-listed stocks and make certain that such operations do not jeopardize their continued existence, (2) adequately protect non-listed species and provide sufficient mitigation for the effects of the hydropower projects, and (3) comply with all relevant laws and policy. The proposed Habitat Conservation Plans purport to be comprehensive agreements to promote actions that will improve conditions and lead to the recovery of species.

#### *Permit modifications*

The National Environmental Policy Act requires an agency to supplement its environmental analysis documents if there are substantial changes in the proposed action or there

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are new circumstances or information. 40 C.F.R. §1502.9. Despite the substantial changes in the Anadromous Fish Agreements and HCPs, however, it is our understanding that NMFS intends to issue a Final Environmental Impact Statement, rather than supplement the existing DEIS. The Federal Register Notice asserts that the revised permit applications, Anadromous Fish Agreements and HCPs reflect revisions developed to address comments received on the DEIS and to clarify the PUDs responsibilities. It also states that the final NEPA determination will be completed after consideration of public comments received on the permits at issue.

The modifications reflected in the most recent permit application and accompanying documents call for NMFS to supplement the existing DEIS, solicit public comment, and then complete its NEPA analysis. The documents set forth new survival standards that have not been evaluated to date. The version of the HCPs analyzed in NMFS' DEIS contained a 95 percent juvenile dam passage survival standard and a 91 percent adult and juvenile project passage survival standard. And, the standards applied to 95 percent of the anadromous fish run. The current versions have modified those standards, albeit to address concerns about the lack of ability to measure the initial standards. The new HCPs call for the PUDs to attain a range of standards, due to measuring limitations. One of the standards – 93 percent juvenile project survival – was not evaluated in the DEIS. In addition, it is not clear to what percent of the run the standards contained in the new HCPs apply. A modification to that component also requires additional analysis.

Further, much analysis in the DEIS focused on the decision making processes and respective authorities and obligations of NMFS and the PUDs. The modifications relating to the PUDs obligations may significantly affect that analysis and represent a change calling for supplemental analysis. American Rivers strongly urges NMFS to release a draft supplemental environmental impact statement prior to completing its NEPA analysis.

#### *Lack of scientific justification*

The HCPs fail to provide quantitative scientific analysis that illustrates that the proposed performance standards will be adequate to recover the ESA listed species. At the outset of discussions regarding HCPs for the Mid Columbia Reach, the original intent was that the HCPs would comprise a component of an overall recovery plan for ESA listed species that considered the effects of all of the Mid Columbia projects as well as salmon recovery actions taken in the Federal Columbia River Power System (FCRPS). Such a basin wide recovery plan has yet to be developed. Therefore, the justification for the proposed survival standards at the three hydropower projects on the Mid Columbia River is not evident.

In addition, the proposed standards focus solely on mortality within the project area. NMFS must take a more ecosystem and life history perspective when analyzing the adequacy of the HCPs. Anadromous fish productivity cannot be addressed merely by measuring direct survival from one point above the Projects to a point below the Projects. The HCPs fail to discuss how delayed mortality from the projects will be addressed.

Finally, lack of supporting quantitative scientific analysis calls into question whether the HCPs are consistent with the fundamental principle of the ESA – using caution in the face of uncertainty. Effective conservation management requires a conservative, species-protective approach to ensure that management decisions made in the face of uncertainty do not place the

species further at risk.<sup>1</sup> An independent peer review panel recently criticized the state of Washington's statewide salmon recovery plan for failing to heed that precautionary principle.<sup>2</sup> The Supreme Court has recognized the importance of this approach in ESA decisionmaking. *TVA*, 437 U.S. at 194. Congress clearly intended that the risk presented by an action be borne by the proposed project, not by the endangered species. The ESA requires that the biological needs of the species be identified and addressed. NMFS failed to do this in its DEIS, and the HCPs provide no additional scientific justification for the proposed standards. Absent such justification, NMFS cannot determine the sufficiency of the standards. And, with respect to data gaps or disputes over information, the benefit of the doubt must be provided to the species.

#### *Clean Water Act issues*

Recognizing that potential water quality issues exist and committing to work together to address them fails to provide the requisite level of analysis needed to move forward with the HCP. The HCPs do not address water quality issues, in particular with regard to temperature and dissolved gas. Such analysis is necessary to facilitate issuance of state water quality certification under section 401 of the CWA. In addition, approval of the HCPs and the measures contained within prior to adequate water quality analysis may ultimately preclude implementation of measures necessary to ensure attainment of water quality standards. Failure to consider fish passage and water quality protection concurrently may result in a failure to achieve relevant water quality standards.

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#### *Tributary Improvements*

A tributary habitat improvement fund is a laudable goal, one that American Rivers supports. We also recognize the difficulty in measuring the actual survival improvements to be obtained through tributary habitat restoration improvements. The central premise of the HCPs – “no net impact” – relies upon 2 percent compensation provided through tributary habitat improvements. They specify a set amount of funding intended to attain that compensation. The HCPs, however, do not provide justification for the funding levels or acknowledge the uncertainty surrounding whether such the improvements will actually achieve the anticipated 2 percent survival benefits. As such, NMFS' analysis of the HCP must fully acknowledge and incorporate such uncertainty surrounding survival benefits that the tributary improvements will contribute. Moreover, its analysis must consider that the expected survival improvements from off site mitigation will not be realized immediately, but rather will take years to materialize.

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#### *Impacts on Non Plan Species*

The HCPs address the needs of several runs of anadromous salmon and steelhead populations. They do not, however, address the needs of Pacific lamprey or sturgeon or evaluate the effects of the HCPs on the non-plan species. While those effects will likely be addressed in the relicensing process, it does not obviate the need to evaluate and consider their effects at this time. Failure to do so may result in measures that adversely affect non-plan species.

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<sup>1</sup> See Noss, R.P., M.A. O'Connell, and D.P. Murphy. *The Science of Conservation Planning*. (Island Press, D.C. 1997)

*Basis for a § 10 incidental take permit*

A critical issue that NMFS has not yet addressed involves reliance upon Section 10 incidental take permits (ITPs) for three federally-licensed hydropower projects. Section 10 ITPs are available for non-federal actions and most permit applications are limited to a period of 3-5 years. Use of a Section 10 permit application in this instance, and for a period of 50 years, is unprecedented, questionable, and should not be undertaken without the appropriate analysis. To date, NMFS has not addressed the different mechanisms for complying with the ESA and whether the Section 10 permits should be available for federally-licensed hydropower projects.

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Thank you for the opportunity to comment. Please feel free to call if you have any questions regarding these comments.

Sincerely,

*Brett Swift*

Brett Swift

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American Rivers (AR)

Comment #	NMFS Reference # <sup>1</sup>
1	27, 45, 47
2	50
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4	5, 28
5	15, 37
6	1
7	7
8	41
9	11, 38

<sup>1</sup> See Appendix C

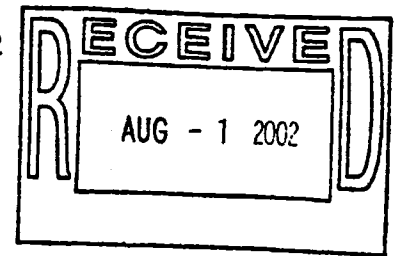
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July 29, 2002



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**RE: Comments on Applications for Section 10 Incidental Take  
Permits 1391, 1392, and 1393 with Habitat Conservation Plans**

Dear Mr. Lohn:

The Columbia River Inter-Tribal Fish Commission (CRITFC),<sup>1</sup> on behalf of the Confederated Tribes and Bands of the Yakama Nation (YN), the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), the Confederated Tribes of the Warm Springs Reservation of Oregon and the Nez Perce Tribe has reviewed the Applications for Incidental Take Permits 1391, 1392 and 1393 with Habitat Conservation Plans (Permit Applications) filed under Federal Register Notice I.D. 061402F appearing on June 25, 2002. We have prepared and are submitting the following comments. We also include by reference the comments of the Yakama Nation and the Confederated Tribes of the Umatilla Indian Reservation on the Permit Applications.

**Overview**

The Yakama Nation and the Confederated Tribes of the Umatilla Indian Reservation aboriginally occupied lands in what is today the Mid-Columbia region in Washington State. The Columbia River and its tributaries are a part of that land. Protection of rivers and flows for anadromous fish and wildlife populations, as well as cultural resources and other matters are critically important to these tribes. The existence and operation of the Wells, Rocky Reach and Rock Island Hydroelectric Projects impacts the treaty-reserved natural resource interests of all four CRITFC member tribes. The outcome of the DEIS process could significantly affect rebuilding of fish and wildlife populations impacted by the Project. Therefore, the tribes have a unique interest and stake in this permit application process that cannot be represented by any other entity.

<sup>1</sup> The CRITFC was formed in 1977 per formal resolution of the governing bodies of the four Columbia River treaty tribes: the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Nez Perce Tribe. The Commission is comprised of elected and appointed tribal officials who are members of the respective tribal fish and wildlife committees. The Commission has technical and legal resources that provide assistance to the tribes in protecting and enhancing their federally reserved trust resources.

Anadromous fish stocks that originate above and within the boundaries of the Wells, Rocky Reach, and Rock Island Projects (Projects) are adversely affected by the presence and operation of the Projects. These stocks support ceremonial, subsistence and occasional commercial treaty fisheries in Lower Columbia River Zone 6 by all of the CRITFC member tribes.

#### General Comments

The use of a Section 10 Permit application to provide a 50-year agreement for coverage of incidental take by three mainstem hydroprojects under the Endangered Species Act is unprecedented and highly questionable. Usually Section 10 Permit applications are for a 3-5 year period, with many of them only for one year. We have serious concerns and question the appropriateness of these proposed 50-year Permit Applications.

The Permit Applications fail to contain any quantitative scientific analysis that justifies the Permit Applications' performance standards as adequate to recover the ESA listed species, Upper Columbia Spring Chinook and Upper Columbia Steelhead. It is as though the performance standards were established to accommodate what the applicants could possibly accomplish without sacrificing significant power production. Thus, other alternatives, which may be necessary to recover upper Columbia anadromous fish stocks, are excluded as possible alternatives in the Permit Applications. Further, the Permit Applications fail to include quantitative scientific analysis that justifies the performance standards as adequate to recover unlisted species, such as coho, summer chinook and sockeye. Without these scientific analyses, and independent peer-review of the analyses demonstrating the likelihood of recovery, we believe that NMFS is risking failure of all anadromous fish stocks in the upper Columbia. The restoration of these stocks is critical to the culture and socioeconomic vitality of CRITFC's member tribes.

The Permit Applications or Habitat Conservation Plans, were originally considered in 1995 by NMFS to be a piece of the overall recovery assessment for Upper Columbia spring chinook and steelhead, to be integrated in a quantitative, holistic, basin recovery plan. They would also be considered in salmon recovery actions taken at Grant County PUD hydroprojects and salmon recovery actions taken in the Federal Columbia River Power System (FCRPS). While NMFS has begun this process with the FCRPS, it is not complete. Nor has NMFS begun such an analysis for mainstem hydroprojects operated by Grant County PUD. The establishment of juvenile survival performance standards in the Permit Applications for three of nine hydroprojects that affect listed and unlisted stocks must pass, is premature. Other recovery actions at the other six hydroprojects and the impacts on these stocks by several federal dams above the nine hydroprojects have yet to specified and quantitatively analyzed in a scientifically-based examination with independent peer-review. It might take a 98% per project survival rate or greater to realize stock recovery to levels that provide tribes with harvestable surplus, but the quantitative work has yet to be accomplished. If independently peer-reviewed quantitative studies show that drawdown and decommissioning (dam removal) are necessary to meet recovery standards that provide harvestable surpluses, then these

options would proceed under a relicensing process under Section 7. No rationale is given as to why the decision would be postponed, given the high probability that upper Columbia listed species, closest to extinction in the basin, may expire in the near future without such measures.

A comprehensive cumulative effects analysis was not incorporated into Permits. For example, Federal operations upstream (i.e. flow and total dissolved gas) impact PUD projects and salmon passage and mortality.<sup>2</sup> Further, the Permits do not incorporate the impacts of global warming on the recovery of plan species. Over the proposed 50 year Permit period, global warming could have a significant impact.

We note that NMFS intends to "consult with itself" on the Section 7 consultation, subsequent to approval of the Permits. However, we believe that this would be meaningless, because the Permit Applications and the actions that they contain would already be approved, whether or not they are adequate to recover the listed species. The precautionary approach to recover the listed species by carefully and quantitatively examining the effects of various recovery actions would be precluded by 50- year Incidental Take Permits.

The proposed 50 year Permits are completely inappropriate for the management of the upper Columbia River ecosystem that support treaty-trust resources.<sup>3</sup> The burden of making up the difference in stock survival and production could fall on the tribes by further restrictions of tribal harvests by NMFS, while the PUDs would continue to harvest salmon through their turbines.

The expedited pace of negotiations from sustained political pressure<sup>4</sup> surrounding the development and finalization of the Permit Applications involved substantial concessions by NMFS and other fishery parties to the PUDs. For example, there was a decision by NMFS, USFWS and WDFW to allow the PUDs to have vote on production and habitat committees when previously the JFP had full authority to manage mitigation decisions through these committees. As another example, under the DEIS, both the 91% per project and 95% per dam survival standards had to be met to move to Phase III (standard achieved), otherwise Phase II of the HCPs would be implemented. Under Phase

<sup>2</sup> On March 23, 1994 and on April 3, 1995 the PUD and fishery party representatives of the Mid-Columbia, Rock Island and Wells Coordinating Committees sent letters to the federal operators requesting minimum flows through the mid-Columbia reach from federal hydroprojects upstream. These joint requests were disregarded.

<sup>3</sup> In comments to the DEIS, Interior noted that under a 50 year permit, NMFS could find themselves in the position of recommending measures that are counterproductive to anadromous fish restoration in future hydro licensing proceedings.

<sup>4</sup> During the later phases of the HCP negotiations it was discovered by the tribes and other fishery parties that the Washington State Governor's office and the Director of the Washington Department of Fish and Wildlife had previously signed on June 1, 2001 an Agreement in Principle with Chelan PUD for an "outcome based approach". This effectively obligated the state to quickly conclude the HCP negotiations. Chelan PUD, in a letter dated October 19, 2001 to the Council of Environmental Quality, also was negotiating a similar agreement with the Bush Administration during the HCP negotiations that created pressure on NMFS and USFWS to conclude the HCP in an expedited manner.

II, the fishery parties would prescribe project operational and structural changes to meet the standards. In the Permit Applications, Phase III has been modified to allow for "provisional review" and "additional juvenile survival studies", that avoids triggering Phase II and effectively reduces the fishery parties' authority in prescribing project operational and structural changes to meet the standards. This is a substantial deficiency in the Permits that should be corrected.

Too many issues in the Permit Applications are left undefined and too many decisions are left to be negotiated in the coordinating committees. This sets the stage for many issues to be elevated to dispute resolution. Our experience in over ten years of Coordinating Committee deliberations indicates that if actions and obligations are not clearly defined in stipulations and settlement agreements, then fish protection measures, mitigation, and compensation can be subject to significant 5 to 10 year delays and may never get implemented.

The Permit Applications allow the PUDs to withdraw from the Permit after they secure their licenses. Withdrawal from the Permits would result in the PUDs being relieved of anadromous fish obligations. For example, NMFS and USFWS would be unable to prescribe gas abatement structures as license recommendations, terms and conditions, which would be necessary to allow spill and reduce dissolved gas to meet water quality standards. The federal fishery agencies often make such recommendations during relicensing proceedings.<sup>5</sup>

The Permit Applications fail to insure a mechanism to establish more protective survival standards mid-way through the Permit terms if the performance standards are inadequate. Because quantitative review of standard adequacy will not be completed for all stocks until after the Permits are issued, there is no provision to increase the standard after the Permits are issued.

The Permit Applications fail to include a fish passage efficiency (FPE) standard for dam passage, which makes monitoring and evaluation of passage measures uncertain for the runs at large and on a real-time basis year in and year out. Not measuring and utilizing FPE data every passage season for the runs at large fosters unnecessary delays in discovering and implementing remedies to improve dam passage. In this respect the Permit Applications are inconsistent with the NMFS' and the federal operators strategies for evaluating performance standards for the FCRPS (1995-1998 and 1998 FCRPS biological opinions), tribal recovery plan and NWPPC *Strategy for Salmon Plan*.

Further, if the standards are met and Phase III is obtained, the PUDs are only obligated to verify the standards by conducting one study every decade. Thus, a series of low flow years with poor juvenile survival could occur after Phase III was reached when no testing was accomplished. A medium to high flow year could occur during the test in year 10, indicating the standard was still being met when in fact much damage was done to the stocks in the intervening years when testing was not required. The lack of a

<sup>5</sup> On June 26, 2002, the Department of Interior filed comments, recommendations, terms and conditions, and prescriptions for various water quality improvements for the Lake Chelan Project, FERC No. 637-022.

provision to examine passage success through FPE monitoring every passage season and evaluation of cumulative and long-term spawner-to-spawner rates and population growth should be an essential component of the Permits.

If Phase III is met and the PUDs conduct one verifying test every decade, the Permits specify that monitoring of continued maintenance of NNI is based on use of a "representative species" (i.e. Rock Island Permit, Section 5.3.3). While the Committee is allowed to pick the species, it is not likely to be the species with the lowest survival (i.e. subyearling summer chinook). The Permits should state that the weakest species should be used for verification testing.

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The Permits do not have an actual requirement that the PUDs rebuild and recover listed stocks. Parties to the Permit can only withdraw for failure to rebuild if the project can be proven to be a "significant factor" in the inability to rebuild. The term, "significant factor" is not quantitatively or even qualitatively defined. Under the Permits, the PUDs are not required to achieve No Net Impact (NNI), but are only required to "implement actions to achieve" NNI.

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The Permits call for raising and releasing summer chinook yearlings instead of subyearlings. This is inconsistent with agreements made between tribes, state and federal fishery agencies in Pacific Salmon Treaty agreements, where subyearling production is prioritized in order to more closely mimic natural production.

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There have been fundamental and substantial changes to the Permits from the three HCPs in which the NMFS' DEIS reviewed in November 2000. Thus, it is critical that NMFS issue a supplemental DEIS that provides full environmental review, analysis and alternatives to these changes in the Permits. NMFS' issuance of a supplemental DEIS would allow the tribes and the public to comment on the document. These changes include but are not limited to:

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- Changes in the project performance standards. Satisfaction of the performance standards for Alternative 3 (HCP alternative) in the DEIS for the PUDs to move from Phase I to Phase III included both a juvenile dam survival standard of 95% per planned species *and* a 91% juvenile project survival standard, which included the dam passage survival of returning adults (page S-18 DEIS). Under the DEIS, both of these standards had to be accomplished to meet the Phase III provisions of the HCPs. The Permit Applications significantly changed this requirement by allowing the Applicants to meet one of the three alternatives in Phase I: 1) a 91% juvenile and adult project survival standard *or* 2) a 93% juvenile project survival standard (without an adult survival component) *or* 3) a 95% juvenile dam passage survival standard (without an adult survival component). Thus, an adult project survival standard is not required under the Permit Applications, nor is a juvenile project survival standard necessarily required until Phase III. Under the Permit Applications, Phase III was further divided into three alternatives (Standard Achieved, Provisional Review or Additional Juvenile Studies) that give the PUDs' more leverage and flexibility with respect to meeting the NNI standard

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which places more of the burden on the fishery resource. These are significant differences that require environmental review.

- In the DEIS, the performance standards for Alternative 3 (HCP alternative) were required to be met in Phase I, otherwise Phase III was automatically implemented. Phase III gives the Fishery Parties significant leverage with respect to prescribing new tools and approaches to meet the standard. The Permit Applications, however, assume that adult survival per project is 2%<sup>6</sup> and that compensation is fulfilled by the 2% tributary fund. After adult survival studies, the Permit Applications assume that increases over the 2% per project assumed adult losses will be compensated from increases in hatchery production, instead of proceeding to Phase III as is required under the HCPs described by the DEIS. These are significant differences that require environmental review. 18
- The HCPs, described by the DEIS, define No Net Impact (NNI) as providing a combined juvenile and adult per-project survival of 91% as a "requirement of the entire run" (emphasis added, Page S-18). Under the Permit Applications, NNI is not specifically defined as what portion of the run is covered, however, dam passage protection is limited under the Permit Applications to spill for only 95% of each planned species juvenile migration.<sup>7</sup> The Permit Applications fail to specifically include the survival standard of 91% of the combined adult and juvenile migration over 100% of the run. These are significant differences that require environmental review, as the Permit Applications have performance standards that reduce protection for ESA listed species. Failure to provide protection for the initial and ending portion of the run could select against important genetic diversity and fitness necessary to recover listed stocks. 19
- Page S-18 of the DEIS notes that recent technology to measure performance standards are available in terms of PIT-tags, miniature radio sonic and balloon tags and these, "...should provide quantifiable survival estimates through the entire project areas, as well as individual passage routes." The Permit Applications cast doubt on the efficacy of these tools and have substituted 95% 20

<sup>6</sup> Page 6-1 to 6-3 of the NMFS' 2000 FCRPS Biological Opinion used adult radio-telemetry studies to estimate the minimum survival rates through the federal hydrosystem. They were derived from dividing the number of radio-tagged adults detected at an upstream dam by the number of adults tagged minus the number of fish accounted for in the study. Multiyear estimates were averaged. Adult per project mortality losses ranged from 1.9% to 4.2 % (Table 6.1-1) through the FCRPS. Thus, the 2% per project adult mortality for the PUD is at the low end of the estimates for losses through the federal system and does not likely represent true adult losses for all Planned Species through the Permit Applicants' projects.

<sup>7</sup> Section 4.3.2 of the Wells Hydroproject Permit Application states that, "Termination of the bypass system between August 15 and August 31 will occur when it can be demonstrated that 95% of the summer migration has passed the project"; Section 5.4.1 of the Rocky Reach Hydroproject Permit Application states that, operation of the bypass will, "...encompass 95% of the juvenile migration of a Plan Species.", and that the District will spill 20% of the Daily Estimated Flow during a period coinciding with the 95% passage of each spring migrating Plan Species and 15% of the Daily Estimated Flow during a period coinciding with the 95% passage of each spring migrating Plan Species; Section 5.4.1 of the Rock Island Permit Application states, "The District shall spill twenty percent of the Daily Estimated Flow to encompass 95% of each Plan Species' juvenile migration."

dam passage survival for entire project survival based upon these doubts. These are significant differences that require environmental review.

Further, there are examples where the NMFS' approach to performance standards and survival and recovery in the Permit Applications are inconsistent with NMFS' performance standards and survival and recovery requirements in the 2000 FCRPS Biological Opinion.

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- The Permits are inconsistent with the 1995-1998 FCRPS Biological Opinion as to the benefits that could be derived from minimum operating pools at the Mid-Columbia Projects. Drawdowns to minimum operating pool have been a fundamental reasonable and prudent measure under the 1995 FCRPS Biological Opinion, and haven't been studied at the Mid-Columbia projects.

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- The Permit Application approach to adult survival through the hydroprojects is inconsistent with the approach in the NMFS' 2000 FCRPS Biological Opinion. The Biological Opinion requires the federal hydro operators to increase adult per-project survival by an average of about 0.5 % in a ten year period (Table 9.7-2; 2000 Opinion), using available radio-telemetry data and future radio-telemetry studies as NMFS' determination of the "best available scientific information". The Permit Applications, however, state that there are no extant methodologies to determine adult per-project survival. Accordingly, the Permit Applications fail to set an increase for future per-project adult survival during the 50 year term of the proposed Permits. Thus, there is no incentive or measurable standard for the PUD's to improve adult per-project survival over a 50 year period. This is an important issue that demands environmental review. It will be difficult to foster a holistic, basin-wide restoration plan for upper Columbia steelhead and spring chinook unless measurable standards are consistent and improvements in survival are quantified with respect to life cycle metrics such as spawner-to-spawner replacement rates and population growth.

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#### NEPA Comments Related to the Permit Applications

We incorporate by reference our February 5, 1999 comments and recommendations made to the DEIS Notice of Intent to Prepare an Environmental Impact Statement (EIS) on the Habitat Conservation Plans (HCPs) for the Operation of the Projects (NOI). We also incorporate by reference into the record the CRITFC May 16, 2001 Comments on the Mid-Columbia Habitat Conservation Plan Draft Environmental Impact Statement. We note that the following critical issues included in these comments continue to be issues in the Permit Applications and should be included and analyzed in an additional Supplemental DEIS by NMFS:

- The Geographic scope should have covered the entire mid-Columbia reach as was originally intended. The Permits should fully consider the cumulative effects of

the operations of federal dams above and below the three HCP dams as well as Priest and Wanapum dams. For example, as evidenced in June of 2002, high levels of total dissolved gas from Chief Joseph Dam has caused spill and juvenile salmon survival to be significantly reduced from the three dams covered by the Permit Applications. If this continues into the future, Permit Application performance standards may not be met.

- According to the Applications, NMFS and the USFWS would not withdraw from the HCP if the PUDs met all conditions except the performance standards, which are the heart of the HCP. Thus, the federal agencies with jurisdiction over the ESA would not have the leverage of the ESA to prevent extinctions. Further, NMFS and USFWS are restricted from recommending drawdowns and/or project removal without the consent of the PUDs- effectively removing a key restoration action that may be required to prevent extinctions. 24
- The Permit Applications fail to address anadromous fish survival and recovery from an ecosystem and life history perspective, instead they are based on juvenile reach survival estimates (ISAB 2002, Williams et al. 1996; Lichatowich and Mobrand 1995). Anadromous fish productivity cannot be addressed merely by measuring direct survival of a small sample of salmon passing from one point above the Projects to a point below the Projects. Fishery managers in the Columbia Basin have always stressed the need to consider the metric of smolt-to-adult survival. Further, impacts from the Permit Application projects can impact the mortality of Permit Planned species downstream. For example, federal water intended to provide flow augmentation for Hanford Reach habitat maintenance that Planned species are utilizing can be captured by the Permit Application projects for power production. The Permit Applications fail to require measures to prevent these downstream impacts. 25
- The Permit Applications fail to adequately address delayed mortality- project impacts that occur beyond the project boundaries. For example, the proposed Rocky Reach bypass system, part of the Permit Applications, contains turbine intake and vertical barrier screens. The scientific literature indicates that juvenile salmon that pass dams through these screens have lower smolt-to-adult survival rates than salmon that pass through a combination of spill and turbines (Budy et al 2002; Bouwes et al. 2002). NMFS should consider a smolt-to-adult metric in the environmental review of the Permit Applications. 26
- The Permit Applications fail to consider juvenile salmon travel time metrics. Juvenile survival standards through the dam or even the dam and reservoir may be independent of travel time, but certainly, reduced travel time has been closely linked with increasing survival and smolt-to-adult return rates necessary for stock recovery. For example, Petrosky et al. (1992) and Schaller and Petrosky (1992) described a statistically significant negative relationship between smolt travel time through the Snake River and subsequent return of adults. NMFS' 1998 FCRPS Biological Opinion notes that there is a strong relationship between flow 27

and reduced travel time for juvenile steelhead. This led NMFS to adopt a target flow in the Mid-Columbia of 135 kcfs for spring migrants. Other supporting literature that indicates reduced travel time for juvenile migrants is related to flow includes Cada et al. (1994) and Williams et al. (1996). Reduction of smolt travel time is positively related to increased smolt-to-adult returns as noted by Petrosky and Schaller (1998) and Schaller et al. (1999) and DeHart (1999). The travel time for passing juvenile salmon through the dam, including the forebay and tailrace, varies with the passage route. NMFS notes that, "Slower travel times could result in greater depletion of energy reserves, reversal of smoltification characteristics and greater exposure to disease", and that, "These factors could lead to delayed mortality not captured in the existing juvenile smolt survival studies" (NMFS 2000). These are the same studies in which the Permit Applications' performance standards are entirely and selectively based. Juvenile salmon subjected to turbine and screen system passage are also subjected to high concentrations of predators in forebays and tailraces (Ward et al. 1995; Chapman et al. 1991). Spill has been demonstrated to be the method that most quickly passes juvenile salmon through dam forebays, concrete and tailraces (ISAB 2002). The ISAB (2002) note that the cumulative travel time savings could be "substantial".

- The Permits should have used the natural river as a baseline in which to measure improvements. When comparing adult passage times through the FCRPS, the 2000 FCRPS Biological Opinion used adult travel time in the unimpounded Snake River below the Hells Canyon Complex and compared that to travel time through the impounded federal hydrosystem. 28
- The Permits do not include Pacific Lamprey and sturgeon. Measures and actions implemented by the PUDs for planned species may select against these stocks (ie turbine intake screens in the Rocky Reach bypass system). Selecting against these stocks could negatively impact salmon that the Permits are supposed to protect and restore. For example, diminished lamprey populations may increase predation on salmon smolts, since lamprey are a prey of choice for fish predators. 29
- The Permits fail to combine the joint goals of meeting water quality standards and fish passage protection. PUD "tools" may limit achievement of both goals unless they are addressed holistically. Forced spill from overgeneration or natural flows can cause elevate levels of dissolved gas impacting plan species and causing delayed mortality. The loss of natural turbidity that protect juvenile salmon from predation has been caused by the presence of the dams and reservoirs; the result has likely been a substantial decrease in upper Columbia stock productivity (Junge and Oakley 1966; NMFS 1999). The Permits do not address these issues. 30
- The DEIS and Permits failed to review and acknowledge water quality standards under the Clean Water Act. A recent court opinion states that dams are not above the law with respect to meeting water quality standards (see National Wildlife Federation v. Corps of Engineers, 132 F.Supp.2d 876 (D. Or. 2001)). 31

- The HCP failed to address water temperature in project fish passage structures and reservoirs. Temperatures at Rock Island from August 16-October 30 have increased about 1 degree C over the historical baseline from the presence and operations of dams (Petersen and Kitchell 2001). The Permits do not address specific adult fishway modifications to reduce temperatures such as structural remedies that would introduce cooler water from reservoirs at depth into fishways. These same remedies were included in the 2000 FCRPS Biological Opinion and should be included in the Permits.

32

- The Permit standards of 93% combined adult and juvenile per project survival will not meet NMFS recovery and survival goals, and are far from tribal goals to recover stocks to meet increased and sustainable harvest levels. The final draft QAR report notes that for example, additional survival improvements of 48% and 19% would be needed to meet the NMFS' 100 year spring chinook extinction risk criteria for the Wenatchee and Entiat respectively (less than 5% extinction at 100 years). This assumes current low levels of tribal harvest continue and also assumes NMFS high risk factor of extinction = 1 fish per ESU. The QAR speculates a "D" value of 0.8 but a recently released memo from NMFS indicates that D values for subyearling chinook from McNary Dam are much lower than 0.8.<sup>8</sup> The QAR failed to consider the merits of the Permit survival standards on mid-Columbia summer chinook or sockeye.

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- The Permits fail to include realistic passage and survival standard for adult salmon. The assumed 2% mortality per project is at the low end of the range with telemetry studies through the federal hydrosystem indicating that mortality ranges from 2-4% per project. There are no adult passage standards (ie time to pass the project; fallback rates, downstream kelt passage) included in the Permits. The Permits place the burden on the resource by calling for study of adult fallbacks without spill instead of implementing protective measures, such as spill to protect downstream moving adults, and studying the results. Recent steelhead telemetry studies in the Mid-Columbia indicated that some 34% of steelhead were kelts that need protection over dams on their emigration to the ocean (English et al. 2001). In other radio-telemetry studies, Evans (2002) noted that very few kelts survived passage through Bonneville and The Dalles dams in 2001 unless they passed during the short periods when spill was provided. This new information that illustrates the possibility of substantial kelt loss impacting the genetic diversity and abundance of upper Columbia steelhead was not addressed by the Permits as the spill period is outside much of the kelt passage period (March).

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- Under the Permits, the burden of proof to fix existing problem areas identified by passage studies (i.e. Rocky Reach adult junction pool) is on the fishery parties to demonstrate that there is a problem. The effects of power peaking, identified to be a significant adult passage problem and included in two FCRPS Biological Opinions, was not addressed in the Permits.

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<sup>8</sup> March 9, 2001 memo from M. Schiewe to B. Brown entitled, "Transportation from McNary Dam. Preliminary Results from subyearling chinook salmon research".

• Socioeconomics. Tribes suffer economically from the loss of the salmon resource and have higher rates of mortality and poverty from these losses than non-tribal citizens. The river wealth has been transferred from the tribes to the PUDs. Neither the DEIS nor the Permits address this critical issue in review of alternatives.	36
• Water rights. The DEIS and Permits failed to analyze the effect of the PUD tools on tribal water rights. Under the DEIS and Permits, for example, the PUDs may choose passage alternatives other than spill, in essence, taking away the spill water right to protect the salmon and transferring that right to putting water through turbines.	37
• Chelan PUD failed to conditionally implement the HCP in 2001 when they reduced spring spill and eliminated summer spill at Rocky Reach and Rock Island, and thus exhibited bad faith. NMFS should require immediate consultation under Section 7.	38
• NMFS should engage the tribes in government-to-government consultation surrounding Permit and NEPA issues. NMFS has yet to provide any government-to-government consultation on these issues. Other issues between the tribes and NMFS relative to reserved treaty fishing rights, such as potential prejudice against tribes posed by the “no surprises rule,” also remain unresolved in the DEIS and Permits.	39
• The DEIS should not have used the existing degraded state of salmon stocks and critical habitat as the environmental baseline, but should have used the natural river baseline as the measuring stick for considering harm and benefits. The DEIS should have taken into consideration the fact that the development of hydroprojects in the Mid-Columbia Reach set in motion a decline in fish populations that continues through much of the Columbia River Basin. NMFS themselves argued for use of a natural river baseline in <u>American Rivers et al. v. Federal Energy Regulatory Commission</u> 201 F.3d 1186 (9th Cir. 2000), but has not used this standard in the DEIS.	40
• The DEIS and Permits lack survival, recovery and delisting goals specific to the listed and non-listed anadromous fish populations considered under the alternatives.	41
• The DEIS and Permits fail to describe how the various alternatives relate to other applicable treaties and laws, including tribal treaties, the Clean Water Act and the <i>U.S.- Canada Pacific Salmon Treaty</i> .	42
• Although the QAR was not mentioned in the Permits, like the Permits, NMFS accepts the risk on the resource instead of a precautionary approach to resource protection. NMFS, 1) used most liberal recruit/spawner data base (1960-present),	43

2) did not meet tribal production goals for harvestable surplus, 3) defined extinction as one fish per population instead of a viable population of several hundred spawners, 4) assumed that federal system performance standard will be met, 5) assumes that 100% NNI over 95% of the migration is met right away, which as stated above is not the case. These issues should be reviewed in a supplemental DEIS.

44

- Permit methodologies for measuring survival and success in meeting standards fail to integrate representative water years. The Permits cut off the top and bottom of the historical flow record as years when the performance standards must be studied. These are precisely the years when juvenile and adult survival should be measured and the effectiveness of dam and reservoir passage noted for improvements.

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- The Permits require tributary trapping. Such trapping causes physical impacts to adults, displaces upstream spawners and causes delays for adults heading upstream. None of these issues are addressed in the Permits.

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- Under the Permits, there could be uncompensated losses. There should be increases in tributary funding or increased hatchery compensations, or improved adult and juvenile survival to compensate for these losses clearly written into the Permits.

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### Specific Comments

#### Rock Island Permit

The Permit allows Chelan to reduce the Rock Island spill level below the April 2, 2000 NMFS-Chelan Agreement of 21-41 kcfs without achieving the performance standard. Under the Permit, Chelan spills only 20% of daily average flow, under the NMFS Agreement they were to spill 41 kcfs until they met the Phase I performance standard of 95% per dam survival. Summer spill is also capped at 20% daily average flow under the Permit. The Permit assumes the low spill estimate will achieve the performance standard until evaluation proves otherwise, placing the burden on the resource. Neither the Permit nor the DEIS provide any analysis on the worth of the Rock Island spill conservation account in generating spill in a low power market such as the current market. It could be that more spill could be obtained for salmon passage under the existing Settlement Agreement than under the Permit. A NMFS email notes that Rock Island produces the most total dissolved gas in terms of kcfs spilled than any dam in the Columbia Basin (May 4, 2000 B. Nordlund to M.Schneider). The Permit fails to include specific actions by schedule as to how Chelan expects to make modifications to structurally abate the gas and meet the performance standard. In 2002, Chelan was unable to spill to 20% daily average flow because of dissolved gas constraints.

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Section 4.9 Study reports. The Permit should specify that draft reports should be provided to the Committee by December 1 of the year of the study to allow time for review and proposal development by the following year, otherwise, delay is likely which will continue to impact the resource.

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#### Wells Permit

The re-opener in the Wells Permit is five years after the check-in point (2013 – 2018) and 6 years after Douglas would get its new license. This gives the fishery parties little leverage to make substantial changes for resource.

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#### Rocky Reach Permit

We incorporate by reference our filings to NMFS and FERC, including our January 14, 2002 comments on NMFS' biological opinion with respect to the Rocky Reach juvenile bypass system. We note that FERC has still not acted upon our request for rehearing of the license amendment. Thus, NMFS action on the Permit is premature. Specifically we raise issues relating to delayed mortality from screen system noted by Budy et al. 2002), Bouwes et al. (2002) and the ISAB (2002), including delays in the forebays, system and tailrace compared to spill passage. We restate our position that an EIS should be conducted on the bypass system as there are other alternatives for fish passage that would better and more holistically protect the salmon and other anadromous fish resource.

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Section 4.9 Methodologies. The Committee should have access to employ independent experts as appropriate to give input on technical issues. The experts should be selected by unanimous consensus and should be funded by the PUDs.

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Section 4.9 Methodologies. If the survival standard (or passage standard) is missed by the average of three years testing being below the standard, then Phase II should be initiated. A miss is a miss.

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Section 5.1 Decision Matrix. The 93% survival standard assumes only 2% adult mortality which is not likely the case. The calculation of the 95% dam survival standard should be specified in the document and based upon a stated FPE measurement, the standard used in biological opinions, recovery plans and the Priest and Wanapum settlement agreement is 80% FPE.

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Section 5.4 gives Chelan complete authority to operate the bypass, provide a spill amount and provide predator control and requires the fishery parties to approve these actions. Section 5.4 specifies bypass system operation from April 1- August 31 - this may not offer early or late migrants protection- particularly an issue for early juvenile spring chinook, kelts and adult fall chinook and steelhead. Section 5.4 includes a formula that biases against the amount of spill provided for species other than yearling chinook. Section 5.4 specifies that under low flow conditions, turbines 1 and 2 (needed to maximize effectiveness of the bypass system) cannot both be operated because of station

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service. Chelan should make the adjustment so that these can operate as first on- last off. Section 5.4 fails to include a monitoring and evaluation process for predator actions and fails to include other predators than pikeminnows.

Section 6.0 of the Permit does not address PUD reservoir operation impacts on downstream fish stocks. (i.e. PUDs can store federal water intended for Hanford Reach and downstream planned species in their reservoirs). This conflicts with Section 9.9 notes that nothing in the HCP is intended to protect Plan species in the Hanford Reach or the Vernita Bar Agreement.

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Section 13. "Daily estimated flow" definition. Adjustment of spill should be made based upon actual instantaneous flows. This is readily achievable by powerhouse operators. "Representative flow conditions". Three years of survival testing should include low, medium and high years based upon the statistical break out of the historical 60 year record at Priest Rapids Dam. Whatever flow year occurs, should be used for the survival study, including a very high flow year or a very low flow year, as long as one year in each category of the historical record is tested. Throwing out the high and low 10% exceedance flows for testing biases survival information.

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#### Summary

The Permit Applications contain new issues, including performance standards that are significantly different than those analyzed in the HCP DEIS. Further, many issues raised by CRITFC's comments on the DEIS remain unaddressed, such as the impacts of the Permit Applications on tribal socioeconomics and tribal trust assets. These issues must be analyzed in a supplemental DEIS.

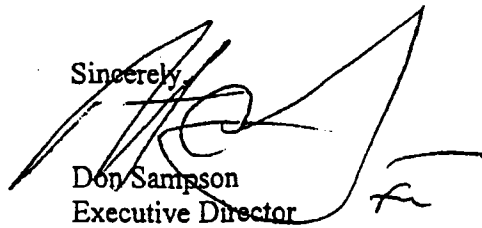
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In addition, NMFS has failed to provide meaningful government-to-government consultation with CRITFC and its member tribes regarding the Permit Applications. If implemented, the Permits would substantially impact treaty-trust resources for 50 years into the future. Other critical issues remain, such as potential prejudice against tribes and forcing tribes to absorb the conservation burden if the Permits fail to recover the listed stocks.

59

The Permit Applications, as they stand, are unacceptable to CRITFC and its member tribes. The Permit Applications place the burden of salmon recovery on the resource in many ways. For example, the Permits allow the PUDs to spill at low levels and study survival at the low levels instead of taking a precautionary approach and initiating spill at higher levels. We urge NMFS to expedite completion of our above recommendations as they are critical to increase anadromous fish survival and productivity to fully recover Upper Columbia populations to sustainable levels that ensure tribal and non-tribal harvestable surpluses.

60

Sincerely,  
  
Don Sampson  
Executive Director

Attachments 1-8

CC: Commissioners, tribal attorneys and program managers, Joint Fisheries Parties.

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**Columbia River Inter-Tribal Fish Commission (CRITFC)**

<b>Comment #</b>	<b>NMFS Reference #<sup>1</sup></b>	<b>Comment #</b>	<b>NMFS Reference #<sup>1</sup></b>
1	11	31	1
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5	35	35	58
6	33	36	33
7	12, Misc. Comments	37	Misc. Comments
8	17	38	36
9	13	39	32
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18	48	48	31
19	49	49	Misc. Comments
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21	8	51	14
22	24	52	17
23	56, 58	53	12
24	24	54	8
25	5, 56	55	18
26	28	56	19
27	6	57	Misc. Comments
28	25	58	33
29	41	59	32
30	1, 3	60	31

<sup>1</sup> See Appendix C



GENERAL COUNCIL  
and  
BOARD OF TRUSTEES

FISH AND WILDLIFE COMMITTEE

CONFEDERATED TRIBES  
of the  
*Umatilla Indian Reservation*

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PENDLETON, OREGON 97801  
Area code 503 Phone 276-3018 FAX 276-3095

July 29, 2002  
Via FAX

Mr. Robert Lohm  
Regional Administrator  
National Marine Fisheries Service  
BIN C-15700  
7600 Sandpoint Way, NE, Bldg. 1  
Seattle, WA 98115  
FAX: (503) 231-2318

RE: Comments on Applications for Section 10 Incidental Take Permits 1391, 1392, and 1393  
with Habitat Conservation Plans

Dear Mr. Lohm:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) offers the following comments on the Applications for Section 10 Incidental Take Permits 1391, 1392, and 1393 with Habitat Conservation Plans. Our comments incorporate by reference those of the Columbia River Inter-Tribal Fish Commission (CRITFC). The Permit Applications were filed under Federal Register Notice I.D. 061402F appearing on June 25, 2002.

The existence and operation of the Wells, Rocky Reach and Rock Island Hydroelectric Projects have impacted the rights and resources of the CTUIR. These facilities will continue to do so for the foreseeable future. Our rights and resources were secured by the Treaty of 1855 between our ancestors and the United States. Through the Treaty, and the federal government's Trust Responsibility, you and other relevant federal agencies must act in a manner that protects and safeguards tribal rights, interests and assets. Paramount among them, and most at issue here, are the right to fish, and the right to have the necessary, healthy habitat, passage and other conditions for their continued survival and harvest. The Projects have negatively affected our rights, interests and assets, and the Draft Environmental Impact Statement (DEIS) process dealing with the Projects similarly has serious implications for their continued existence and exercise.

Initially, we note that a Section 10 Permit application addressing a proposed a 50-year agreement for incidental take coverage for the Projects is unprecedented, raising significant questions and concerns. Such applications normally cover a much shorter time period, sometimes merely 3 to

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5 years, with some as brief as one year. Extended coverage for this time frame may not be sufficiently responsive to changing circumstances.

The applications do not contain the quantitative scientific analysis needed to justify the performance standards' adequacy for recovering ESA-listed species. They also do not include the analysis justifying the performance standards applicable to unlisted species (e.g., coho, summer chinook and sockeye).

Furthermore, the applications and the Habitat Conservation Plans (HCPs) they involve were originally considered in 1995 by NMFS to be components of a much larger, more comprehensive assessment and recovery planning process. This process was to include the Projects at issue here as well as the Grant County P.U.D. projects and those of the federal hydrosystem both above and below the P.U.D. projects. This process has begun for the federal hydrosystem, but it has not been finalized. The process has not begun for the Grant County P.U.D. Projects. Thus, dealing with only three projects as the applications do here is a precariously piecemeal approach. More elaborate, comprehensive analysis may indicate that higher performance standards are warranted for ultimate population survival and recovery, and disproportionate measures may then be required for other projects or mortality factors not covered by these applications. The burden of making up the difference in stock survival and production should not fall unfairly on the tribes by further restrictions of tribal harvests, while the permittees continue to harvest salmon through their turbines at more generous rates.

There have also been some substantial, fundamental changes in the applications from the three draft HCPs on which NEPA review was conducted in the November, 2000, DEIS. As such, we believe that a supplemental DEIS should be developed and issued. We also ask that NMFS consult with the CTUIR on a government-to-government basis on this matter.

Thank you for your consideration of our comments above. Please feel free to contact me at the number above, or Carl Merkle with our staff at (541) 276-3449.

Sincerely,



Jay Minthorn  
Chairman, Fish and Wildlife Committee

JM: DNR: EP/RP: cm

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Confederated Tribes of the Umatilla Indian Reservation (CTUIR)

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Comment #	NMFS Reference # <sup>1</sup>
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3	4, 33
4	32, 45

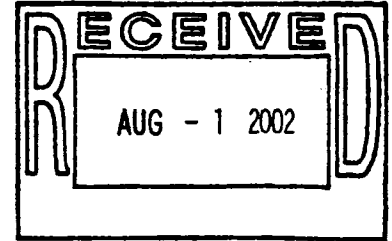
<sup>1</sup> See Appendix C



# NATIONAL WILDLIFE FEDERATION\*

People and Nature: Our Future Is in the Balance

Northwestern Natural Resources Center



July 29, 2002

Ritchie Graves  
National Marine Fisheries Service  
Hydro Program  
525 N.E. Oregon Street  
Suite 420  
Portland, OR 97232-2737  
Fax: (503) 231-2318  
VIA FAX & U.S. MAIL

Re: Applications for Incidental Take Permits, Chelan and Douglas Co. PUDs.

Dear Mr. Graves:

I am submitting these comments on behalf of the National Wildlife Federation, the nation's largest conservation education and advocacy organization, regarding the June 25, 2002 Federal Register announcement pertaining to the revised applications for incidental take permits from PUD No. 1 of Douglas County and PUD No. 1 of Chelan County. We appreciate your authorization of an additional two business days to submit these comments, as you indicated during our conversation on July 25, 2002.

NWF has submitted formal and informal comments to NMFS at various stages of this process. These include a Feb. 5, 1999 letter from NWF to Jane Banyard at NMFS objecting to the HCP's NEPA scoping notice, and May 1, 2001 comments on the Draft Environmental Impact Statement submitted by a number of conservation and fishing groups. These comments are incorporated by reference into this letter. NWF recognizes that substantial revisions have been made to the agreements since those comments were submitted, and to the extent that revisions reflect those comments and address concerns raised in them, NWF thanks NMFS for its efforts.

As a threshold matter, we are left somewhat confused about the procedural context of these comments. Are these comments mandated by either the NEPA or ESA public comment process for development of HCPs and EISs? How do these comments relate to the FERC relicensing that will follow? We respectfully request that you clarify why this notice is required, how it relates to other comments in the past and future, and, if appropriate, provide an opportunity for the public, including NWF, to supplement its comments.

Despite some progress in the HCPs since the issuance of DEIS, NWF continues to have serious concerns about the legality of the process and the biological integrity of the agreements. NWF continues to question both the wisdom and the legality of implementing a 50-year HCP for what is essentially a federal action – FERC licensing of a highly regulated activity. The process appears to us to be motivated more by the PUD's desire for certainty in long-term planning than

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by the imperatives of the ESA and tribal treaties. However, dam operators have long understood that the terms and conditions of their licenses are subject to substantial and periodic revision, particularly in light of the plight of imperiled salmonids and evolving scientific information.

We continue to believe that the Section 7 consultation process may provide a more nimble means to ensure that the FERC licenses provide for fish recovery and to provide for changing conditions and new information. We remain deeply concerned that these agreements will commit the resource agencies to a course of action that could restrict options later. Even if NMFS commits to this process, it still has obligations under Section 7 to consult with itself over the issuance of the HCP, and with FERC over issuance of the license. These consultations must be comprehensive, include the best science, adhere to regulations and the § 7 consultation handbook, and address the many concerns raised by conservation groups, tribes and states. The resulting biological opinions and/or concurrence letters are subject to judicial review.

NWF's review of the agreements leads us to believe that they will not stem the slide of upper Columbia salmon and steelhead stocks into extinction. Indeed, the final technical review draft of the Quantitative Analysis Report indicates that substantial additional survival improvements, above and beyond the HCP's goals, will be necessary to meet recovery goals. Moreover, the HCPs rely on optimistic assumptions and lax standards, and ignore critical facts. This violates the ESA, which mandates that ITPs ensure that takings be minimized to the maximum extent possible, and that they will not reduce the likelihood of the species' survival and recovery. Many of the substantive concerns are presented at length in the comments we have already submitted, and in comments submitted by the Columbia River Inter-Tribal Fish Commission and other tribal, state and conservation entities. NWF shares many of these concerns, including the following:

- Inadequate cumulative effects analysis, including impacts of poor implementation of the FCRPS BiOp and the lack of ITP/§ 7 consultation for Grant County PUD's Priest Rapids Project.
- Inadequate analysis of delayed mortality.
- Failure to ensure water quality standards will be met.
- Inadequate survival standards to permit recovery, particularly in light of FCRPS BiOp standards, questionable implementation, and other mainstem and tributary impacts to fish.
- Inclusion of inappropriately optimistic assumptions, including low adult passage mortality, low tribal harvest, and NMFS "1 fish" extinction threshold currently in litigation.
- Extensive time for PUDs to reach "no net impact" standard, even though Upper Columbia stocks are in a crisis and may be functionally extinct within a few generations.
- Inadequate analysis of how tributary improvements will make up for dam mortality, particularly in light of delayed benefits that may accrue from habitat improvements.

- Lack of analysis of hatchery component in light of NMFS' draft new hatchery policy, which requires heightened scrutiny of hatchery fish on the survival and recovery of wild fish.

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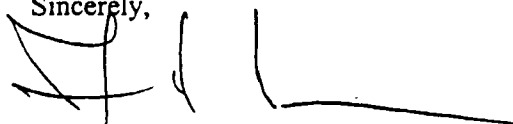
These are illustrations, not a comprehensive list, of the issues that fish advocates have been raising for some time that have yet to be addressed. In short, NWF does not believe that the Mid-Columbia ITP applications will, if formalized in the HCP process, meet the letter of the Endangered Species Act and tribal treaties by promoting the survival and recovery of upper-Columbia river salmon and steelhead. In our view, the ITPs are motivated first and foremost by the PUDs' perceived financial constraints. This is not the law.

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Moreover, NWF has repeatedly expressed its concern that the ITP for Chelan PUD will supercede the Rock Island Settlement, to which NWF is a signatory. That settlement agreement, adopted by FERC as a license amendment, cannot be superceded unless the modification is presented to NWF with an opportunity to negotiate. In our Feb. 5, 1999 letter to NMFS, we explicitly noted this concern and asked that "we be notified of any discussions concerning revisions to this settlement." Regrettably, this does not appear to have occurred. NWF has not been notified of meetings and has not been asked for its consent to supercede the settlement agreement. In fact, when undersigned counsel for NWF attempted to participate in one discussion on the HCPs sponsored by NMFS, I was asked to leave. Since that time, although I have on several occasions pointed out to NMFS and Bonneville Power Administration staff our concerns about the HCPs in relation to the settlement, NWF has not been put on any mailing lists or asked to participate in any discussions on the subject. Considering that there appears to be little opportunity to substantially revisit the ITP's terms at this late stage, NWF may be forced to object to FERC when Chelan seeks modification of the license.

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Sincerely,



Jan Hasselman  
Counsel for National Wildlife Federation

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National Wildlife Federation (NWF)

Comment #	NMFS Reference # <sup>1</sup>
1	Misc. Comments
2	11, 38
3	38
4	15, 53
5	4
6	28
7	1
8	4
9	55
10	13
11	7
12	42
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14	44

<sup>1</sup> See Appendix C

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LEGAL ASSISTANT  
PATTI MCCOY

PLEASE NOTE OUR NEW STREET ADDRESS  
EFFECTIVE FEBRUARY 19, 2002  
\*\*\*\*\*

July 29, 2002

Sent via Facsimile  
Fax No. (503) 231-2318

Mr. Ritchie Graves  
National Marine Fisheries Service  
Northwest Region Hydro Program  
525 N.E. Oregon St., Suite 420  
Portland, OR

Re: Comments on Proposed Incidental Take Permits 1391, 1392 and  
1393 with Habitat Conservation Plans

Dear Mr. Graves:

Please accept the following comments on this proposed action on behalf of the Yakama Nation. After significant consideration and discussion, the Yakama Tribal Council has decided that participation in these Habitat Conservation Plans, in their current format, is not in the best interest of Yakama's treaty reserved rights in the Columbia Basin.

The geographic scope of the HCPs falls within the ceded territory of the Yakama Nation and the operation of the hydroelectric projects in the HCPs affects the treaty fish on which the Tribe relies. In the Treaty with the Yakama, 12 Stat. 951, Art. 3 (June 9, 1855), the Yakama Nation reserved the right of "taking fish at all usual and accustomed places in common with citizens of the United States." Retaining the right to continue its traditional fishing practices was a primary objective of the Tribe during treaty negotiations. Tulee v. Washington, 315 U.S. 681, 684-85 (1942); Washington v. Washington State Commercial Passenger Fishing Vessel, 443 U.S. 658, 664-69 (1973).

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The treaty guarantees to the Tribe an equitable share of the fish. See United States v. Oregon, 302 F.Supp. 899 (D. Or. 1969) and United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974). As well the right to have these fish present for harvest. Commercial Passenger Fishing Vessel, supra. The Tribal right to harvestable fish includes those produced in hatcheries intended to make up for fish lost due to hydropower development or other man induced causes. United States v. Washington, 566 F.Supp. 187 (W.D. Wash. 1981), aff'd 759 F.2d 1353 (1985). Anadromous fish and lamprey have significant cultural and religious significance to tribal members, provide members with subsistence for health and well-being, and contribute to a critical share of tribal commerce in an area of limited economic opportunity. Additionally, the Yakama Nation actively co-manages the fishery resource along with federal and state authorities through the U.S. v. Oregon process, and is a party to the Mid-Columbia proceeding before the Federal Energy Regulatory Commission involving the Chelan and Douglas County Public Utility Districts. Accordingly, Yakama is intimately involved with and concerned about the protection and enhancement of Mid-Columbia stocks, and has a treaty reserved interest in the outcome of these permits.

A threshold issue here is what are these comments required to address. The Yakama Nation, together with a myriad of other parties, filed extensive comments on NMFS' Draft EIS on an earlier version of the HCPs addressing both Section 10 and NEPA issues. NMFS has never responded to those comments nor has it issued a final NEPA document.

Now, in this notice, NMFS alleges that the HCP and permit application "reflect revisions developed to address comments received on the DEIS and to clarify the PUDs' responsibilities, seeming to reflect that such action, without stating how, somehow satisfy the NEPA process standard with the DEIS, and NMFS does not now need to file a supplemental DEIS.

The revised HCPs do not specify in any manner which of the DEIS comments they address, nor do they set forth in any manner how, if they satisfy those concerns, they meet the NEPA requirements discussed in the DEIS. This fails to meet NEPA requirements for responses to comments, and does not address the substantial changes in circumstances, including the highly significant point that not all contemplated parties will be signing the agreements.

Further, the notice is unclear as to how NMFS intends to proceed with the Section 10 and NEPA reviews. Does NMFS intend to complete the NEPA process and issue a final EIS before it proceeds to the approval of the HCPs? Clearly, the approval of the HCPs would be a major federal action and, accordingly, Yakama submits that the

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NEPA process needs to be completed prior to HCP approval. Yakama, as discussed infra, submits that substantial changes both in the circumstances of the parties and scientific elements of the permits warrant issuance of a supplemental EIS with an opportunity for additional review and comment.

Without such a supplement, the procedure NMFS intends here effectively denies the right of interested parties to review and comment on a draft EIS prepared on the proposed actions - here, approval of revised Section 10 applications. The current DEIS, on which the parties previously commented, was based upon a different version of the HCPs,<sup>1</sup> which this notice states were revised in response to many of those comments.

As noted above, there is no way for a commentor to know how or to what extent those changes occurred or to evaluate their substance. The NEPA analysis now being conducted is on a document done under circumstances that have changed substantially from the one commented on previously. NMFS should review these comments, compare them with the previous ones and issue a supplemental DEIS with an appropriate comment period. The specifics reflecting the changes are discussed more specifically infra.

Because of the lack of clarity as to what it is that needs to be commented on here, Yakama hereby incorporates its DEIS comments as part of these comments. Yakama further incorporates by reference the DEIS comments of CRITFC and Save Our Wild Salmon (SOS) as part of these comments, as well as their current comments in this process.

#### General Comments Applicable to All HCPs

The 50-year time frame for these agreements is unprecedented. As the DEIS comments note, such a time frame is simply not contemplated by Section 10 and here should be significantly shortened. If Section 10 is deemed legally appropriate, then the permits should be based upon time frames specifically tied to each project, and provide ESA coverage for several salmon generations thereafter to determine if the theories work, rather than allowing the PUDs to receive a blanket 50 years of protection.

As the proposed HCPs also affect tribal trust resources over a long period of time, the analysis of impacts on the Plan species must

<sup>1</sup> While many of those comments are still relevant here, particularly as to legal implications, and are all incorporated here by reference, circumstances have changed significantly and warrant a supplemental EIS.

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also include compliance with treaty reserved rights - including rebuilding to sustainable, harvestable populations over and above what would be required for de-listing under the ESA. This is particularly important in a situation such as this, where NMFS proposes that the permits fulfill not only ESA, but also Federal Power Act (FPA) relicensing requirements. As NMFS' own salmon recovery policy provides, "It is our policy that the recovery of salmonid populations must achieve two goals: (1) Restore salmonid populations to the point where they no longer require the protection of the ESA, and (2) restore salmonid populations to a level that allows meaningful exercise of tribal fishing rights. McElhany, P., M.H. Ruckelshaus, M.J. Ford, T.C. Wainwright, and E.P. Bjorkstedt. 2000. Viable salmonid populations and the recovery of evolutionarily significant units. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-42,156 P.34 (hereinafter "NMFS VSP"), citing (Garcia 1998). Neither the DEIS or permit applications make reference to rebuilding to harvestable run sizes, which, as noted, violates NMFS' policy. Further, neither the permits nor the DEIS provide any analysis of how the failure to provide for harvestable runs satisfies the FPA equitable treatment rule.

The HCPs continue to provide for the No Net Impact concept, implying that the concept applies to 100% of the Plan species. In fact, the measurement and protection measures include only 95% of the run. The permits sacrifice 5% of what NMFS has itself designated as the most critically depressed stocks in the entire basin. Neither the DEIS or the revised HCPs account for these losses, or make any provision for replacement of those losses. As is set forth in the incorporated DEIS comments, neither ESA nor NEPA sanctions such an action. This issue is discussed in more detail in the technical comments section of the CRITFC comments which are incorporated by this reference.

The revised HCPs, while better than the previous drafts, still fail to guarantee the 7% hatchery mitigation component. While the new agreements place time and administrative constraints on NMFS' ability to modify the hatchery program, NMFS' ability to totally close that program remains. The new drafts do provide that "other" actions at the hydro facilities can be taken to require a make-up of any losses, but the agreements make no provision for compensation during any transition period, nor is there any guarantee that these other measures to be proposed will be in any manner as effective as the hatchery production in protecting and recovering Mid-Columbia stocks. At the very least, in the event of a hatchery reduction, the agreements should require action by the PUDs to both equal that reduction through survival increases coupled with temporarily providing even greater survival to compensation for the interim losses that certainly will occur.

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Further, the lack of a guarantee of the hatchery component at 7%, even if somewhat mitigated by other PUD actions, still have a potential for the loss of consideration to the run PUD parties. These parties accepted - or attempted to negotiate to an acceptable degree - the NNI concept based upon the concept that unavoidable losses would be compensated for. Under the current agreement, NMFS may stop the hatchery production, and attempt to mitigate its loss elsewhere. Whether this will work is highly speculative and again the PUDs get virtual certainty while the fish and the other parties bear the lion's share of the risk, all of which is contrary to the dictates of the ESA and the FPA.

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All of the agreements provide for the achievement of NNI by 2013. None of them provide provisions for compensation for losses above NNI occurring from the present to 2013, either by more stringent measures to reach NNI or increased hatchery compensation. These agreements, allegedly in compliance with the ESA and FPA standards requiring adequate fish protection, make no provision for compensation for losses occurring between the present and the achievement of NNI in 2013. In light of NMFS' concerns regarding the critical status of the listed stocks, allowing 11 years to reach NNI poses far too much risk on listed stocks.

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The lack of any such provision provides the PUDs with an exemption from the dictates of the ESA and FPA requirements during the period that they are preparing "to achieve" NNI. Neither of those statutes contemplates such an exemption. The DEIS is inadequate on this issue. This analysis should be covered in a supplemental EIS. It must analyze the impact of this situation and provide alternatives to ensure that statutory requirements are met under both the ESA and NEPA.

The agreements fail to provide any workable, enforceable dispute resolution mechanism, or, in its place, any form of judicial relief from legitimate disputes involving the Plan species. While the committee structure of the HCP provides for "consensus" decision making, there is no provision as to how the lack of a consensus may be resolved. Such a process can, and in the current Mid-Columbia proceedings has, lead to decision making by making no decision, or conversely, the result of inaction while the fish are moving, finally results in pressuring the non-consenting party/parties into relenting on an otherwise legitimate position.

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As these agreements are intended to fulfill FPA requirements, Yakama submits that the lack of recourse, even to FERC through reopeners or petitions for FERC administrative review radically changes past FERC practice without adequate analysis or discussion in the DEIS, and likely are violative of the FPA.

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It further fails to provide a speedy and adequate means of dealing with disputes involving listed species which are the subject of this proceeding. While there is no specific ESA requirement that an HCP have a dispute resolution mechanism, the ESA does require that the listing agency's hands not be tied while it carries out its statutory duties. This agreement is for a period of 50 years, and delay due to disputes over such a long period can have serious consequences for the resource. As noted above and in previous DEIS comments, these provisions also prevent FERC from exercising its traditional "reopener" style oversight. Neither the permits nor the DEIS analyze or discuss this problem.

#### Federal Power Act Concern

The HCPs and the DEIS specifically state the HCPs would "supersede the existing FERC license conditions and settlement agreements as they pertain to anadromous fish." It is also the intention of the parties to the HCPs that they satisfy NMFS' and USFWS' Federal Power Act obligations pursuant to Section 18, 10(a) and 10(j). Neither the HCPs nor the DEIS contain an analysis of this process, nor an explanation as to whether there is a statutory basis for such action under either the ESA or the FPA.

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Both the Federal Power Act (FPA) and NEPA obligate a hydroelectric licensee to incorporate pre-project conditions in the relicensing process. As currently written, the DEIS and HCPs limit these requirements. Section 10 of the FPA establishes two mechanisms for requiring the analysis of pre-project conditions. First, Section 10(a) requires an assessment that ensures the "equal consideration" of non-power values, including fish, wildlife, recreation, and environmental quality, when relicensing a hydroelectric facility. 16 U.S.C. § 803(a). A proper assessment of giving equal consideration cannot be determined without first understanding how the project has impacted environmental resources and how these resources could be restored. The DEIS utterly fails to address those issues by ignoring the pre-project conditions. The HCPs contain no provisions for such an analysis.

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Second, § 10(j) of the FPA also compels a pre-project analysis by requiring that relicensing be conditioned upon the inclusion of "adequate and equitable" fish and wildlife protection, mitigation, and enhancement measures. 16 U.S.C. § 803(j). (SOS comments on DEIS).

Neither the DEIS or the HCPs provide any means of determining whether the HCP satisfies the requirements of the FPA for relicensing. This is particularly vexing in a situation such as this, where the HCPs are intended to support two relicense proceedings for at least two of the permit holders.

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Further, the DEIS fails to in any manner analyze or discuss whether the HCPs fulfill the obligations of NMFS under its FPA conditioning authority.

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Finally, there is no analysis of the input of the "no surprises" policy on the requirements of the FPA to ensure "equitable treatment" for fish and wildlife under the term of the license. It is apparent that the "no surprises" provision in the HCPs eliminate FERC's ability to use its traditional "reopener" clauses to ensure compliance with the FPA. Again, there is no analysis of those provisions in the DEIS.

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#### Termination of the Wells and Rock Island Settlement Agreements

The Wells and Rock Island settlement agreements mandate that the signatories will jointly petition FERC to eliminate those agreements from their licenses. This provision clearly contemplates that all of the signatories to those agreements would also be signatories to the HCPs and would, therefore, be bound to make such a filing, with a unanimous filing simply melding these agreements into the HCPs, no one's rights would be compromised. As of the date of these comments, it appears that at least three signatories to the Rock Island agreement, Yakama, Umatilla and the National Wildlife Federation, and two parties, Yakama and Umatilla, to the Wells agreement have not signed or approved the HCPs, and are not presently bound by their provisions.

Yakama, as a party to those previous agreements, which are contracts between the parties based on highly valuable consideration, objects to inclusion of that provision in the HCP and requests that it be deleted or modified to ensure that Yakama's rights under the Rock Island and Wells Dam agreements are in no way compromised. Such a deletion would guarantee that Yakama continues to have a seat at the management table through those agreements. While those agreements provide that a party may move to modify the agreement, neither of them contemplate that a party or parties may request that FERC simply cancel the agreements and terminate contractually vested rights of the minority parties. It is inappropriate for NMFS to sanction such an action through the ESA or NEPA process and, as noted *infra*, violates its responsibilities under Secretarial Order 3026. Further, NMFS should consider a mechanism to ensure meaningful tribal participation in the HCP process if it is approved.

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Further, as Yakama is a party to the Mid-Columbia FERC proceeding which provides Yakama access to the fishery management process occurring with regard to Rocky Reach Dam, it is also inappropriate to permit dismissal of that process. Again, Yakama has significant vested rights which are provided protection under its participation

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in that proceeding. NMFS must analyze this provision, both under the contractual basis for those right and under NMFS' trust responsibility as discussed infra.

Analyzing this portion of the permit applications, and exploring the alternatives - such as providing Yakama a meaningful seat at the management table rather than destroying the Mid-Columbia FERC proceeding and agreements is highly appropriate under CEQ regulations. The permit applications at present provide for a cancellation of the Wells and Rock Island agreements, while those agreements themselves only allow a modification of their terms, and then only if the party(ies) requesting the modification satisfies the "burden of proof" justifying such a modification. See Wells Dam Settlement Agreement I.C.3.

Eliminating the settlement agreements and thereby excluding at least two co-manager Indian Tribes from further participation for the next 50 years merits analysis as to what other alternatives may be available to prevent this significant change from occurring. This is particularly true in light of Yakama's undeniable leading role in Mid-Columbia fishery production that is occurring under the Wells and Rock Island agreements and at Rocky Reach through the Mid-Columbia FERC proceeding. Yakama asserts that depriving it of its significant scientific and co-management role in the Mid-Columbia FERC processes for the next 50 years will significantly impact the fishery protection and production environment in the Mid-Columbia, an action which warrants a "hard look" in this process. This has not been discussed in any manner in the current DEIS. Under such circumstances, NEPA requires a rigorous analysis and a discussion of the alternative (40 CFR 1502.14(a)). 40 CFT 1502.14(b) mandates such a review and mandate that NMFS:

Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

Further, 40 CFR 1052.14(f) requires that NMFS provide "appropriate mitigation measures" if they are not included in the proposed action. Here, the proposed action is to shut out two Indian Tribes and a national conservation organization for the next 50 years. Simple equity and morality, let alone the clear dictates of NEPA, demand that NMFS re-analyze this situation and provide alternatives and appropriate mitigation should it choose to approve the permits.

#### Waivers of Past Claims Are Inappropriate

The permit applications require irrevocable waivers of past claims for damages. Such provisions are inappropriate in an ESA and NEPA context. Nothing in either statute or their implementing

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regulations provide for ESA or FPA fishery protection measures being available only if parties to any agreement waive their past claims. NMFS should strike these provisions from the permits as being outside the scope of permitted actions under the NEPA, the ESA and the FPA.

The DEIS Misinterprets the Requirements of the ESA

The following three paragraphs are a direct quotation from the comments of Save Our Wild Salmon (SOS) in the DEIS process. Yakama believes they are highly relevant and bear repeating here.

The DEIS fundamentally misunderstands the requirements of the ESA and its relationship to hydroelectric projects. In several places, the DEIS states that NMFS cannot legally mandate drawdown or dam removal until project relicensing. See, e.g., Table 2-8 at 2-57 or 4-29 & 2-45, respectively. This is simply not the case. These projects currently hold licenses that contain reopener clauses that allow FERC to change or revoke the licenses due to fish and wildlife concerns. As a result, FERC retains ongoing authority and jurisdiction over these projects. Courts have found that this ongoing jurisdiction requires the federal agency with this authority to reinitiate consultation and to take whatever action necessary to protect the listed species. See Water Watch of Oregon v. U.S. Army Corps of Engineers, Civ. No. 99-861-BR (D. Or. June 7, 2000) (finding that a reopener clause in a federal permit required the Corps to reinitiate consultation over a water withdrawal). NMFS' elimination of the dam removal alternative is simply inconsistent with federal law. We strongly urge the agency to reconsider its elimination of this alternative.

Additionally, the ESA requires NMFS to consider alternatives that are much more protective of fish than the HCPs proposed in Alternative 3 of the DEIS. The ESA requires that an HCP minimize and mitigate the taking of endangered and threatened species to the "maximum extent practicable." 16 U.S.C. § 1539(a)(2)(B)(ii). As discussed earlier, the DEIS fails to consider any alternative that would be more protective of fish, such as the installation of sluiceways at each project. NMFS' failure to consider this and other, more protective alternatives violates the ESA's "maximum extent practicable" requirement. As Courts have held, "the most reasonable reading of the 'maximum extent practicable' nonetheless requires the Service to consider an alternative involving greater mitigation...." The

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Administrative Record must contain some analysis of why the level or amount [of take] selected is appropriate for the particular project at issue.'" National Wildlife Fed'n. v. Babbitt, 128 F.Supp.2d 1271, 1292 (E.D. Cal. 2000) (citing Sierra Club v. Babbitt, 15 F.Supp.2d 1274, 1279-82 (S.D. Ala. 1998)). NMFS must not only show that the mitigation proposed in the HCP is practicable, but must demonstrate that a higher level of mitigation would be impracticable. Just as NMFS cannot satisfy NEPA's range of alternatives requirement with the discussion of only 2 alternatives, such a narrow range of alternatives similarly fails to satisfy the requirements of the ESA.

Also disturbing is the manner in which the DEIS treats permit revocations. The ESA requires revocation of the permit if the permittee is not meeting the permit's terms and conditions. 16 U.S.C. § 1539(a)(2)(C). However, the HCPs appear to limit this revocation authority in two significant ways. First, the HCPs only allow revocation after year 15. So, the PUDs could fail to meet the terms and conditions of the HCPs for 14 years without recourse. DEIS at S-16; 2-33. Second, the revocation at year 15 may be exercised only if NMFS is specifically seeking drawdown, dam removal, and/or a non-power operating action. Neither limitation is consistent with ESA requirements. We urge NMFS to review the law and the underlying HCP agreements to ensure consistency. (Emphasis added).

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The HCPs Allow for the Use of Hatchery Production Fish for  
Test Fish and Studies Without Accounting for  
Those Losses in the NNI Process

The HCPs contemplate massive, long-term testing using significant numbers of fish. There is no argument that test fish, which must be handled and stressed, suffer an increased mortality. Under Section 4.1 or 4.10 of the HCPs, the PUDs retain the right to use a portion of the 7% hatchery mitigation production for these tests without additional compensation to insure that NNI is achieved. This writer is advised that Chelan PUD is currently using a large number of production fish in its tests this season, relying on the HCP agreements which are not yet in place or approved.

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There is no "hard look" at this situation in the DEIS, nor is there any manner in which these fish may be replaced. Loss of these fish is not calculated in the NNI process. This issue is of significance as to the numbers of production fish lost due to testing. An analysis of this situation is necessary, and has not occurred.

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The DEIS and the HCPs fail to err on the side of caution in the face of uncertainty.

The Supreme Court, in TVA v. Hill, 437 U.S. 153, 194, stated this rule succinctly:

Congress has spoken in the plainest of terms, making it absolutely clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

The Ninth Circuit, following TVA, determined that the risks presented by a proposed action must be borne by the project and not by the endangered species, and that Congress clearly intended that federal agencies give the "highest priorities" and the "benefit of the doubt" to preserving endangered species. Sierra Club v. Marsh, 816 F.2d 1376, 1389 (9th Cir. 1987).

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In this process, the DEIS and the HCPs both candidly recognize that here the risk of uncertainty has been placed upon the listed species in order to accommodate the PUDs' need to generate power. That is reflected in the language of the preferred alternative in the DEIS.

As SOS notes in its DEIS comments at Pages 7 and 8, the risks presented to the fish are greater than the risks proposed to the PUDs. The risk of uncertainty here is placed squarely upon the back of the resource, turning the intent of the ESA on its head.

Again, as SOS notes in its comments, the "adaptive management" provisions of the agreements do little, if anything, to alleviate this risk. During the initial 15 - now 11 years - period, the resource bears the risk of all uncertainty, while PUD generation is assured. Yakama asks NMFS to reverse this course and place the risk of uncertainty on the projects.

Measures for Adult Fish Are Inadequate and Again Place the Risk of Uncertainty on the backs of the Fish

The HCPs fail to adequately address adult passage and survival standards and measures, which are in turn inadequately addressed in the DEIS. (See CRITFC DEIS comments and current comments which are incorporated here). The adult anadromous fish issue was a significant sticking point during the HCP negotiations, with the result being inadequate provisions for adult in the HCPs. None of the scientists involved dispute that the 2% is a very speculative number. Though the HCPs take into account some adult losses (an assumed 2% that figures into the 9% mitigation component of No Net

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Impact), the actual amount of adult losses has not been quantitatively measured and the HCPs acknowledge the lack of certainty regarding such measurements. Such a lack of precision by the potential allowance of the Public Utility Districts to ignore operational and structural fixes under Alternative 3 that could be made at their projects to benefit adults. This factor should be taken into account in the DEIS analysis and comparison of the alternatives, particularly because returning adults that make it to the spawning grounds contribute significantly to the next generation of juveniles. Unmeasured losses can significantly skew the NNI calculation. Adults must not be forgotten or ignored in the environmental review. Furthermore, under each of the alternatives, the DEIS should provide a discussion and analysis of measures and standards that could increase adult passage survival, such as improved passage time, reduction of adult fallback rates, and limits on power peaking operations.

Further, as the comments filed by CRITFC pursuant to this notice reflect, and incorporated here by this reference, there is considerable evidence from other fora, such as the FCRPS Biological Opinion and other Corps of Engineers studies reflecting that adult mortality may be as high as 4%, double the figures in the preferred alternative. Should that prove to be the case, the HCPs are significantly inadequate. Again, the HCPs and the DEIS, in violation of law, place the burden of uncertainty squarely upon the backs of the listed fish, allowing certainty of power generation to the applicants. NMFS should re-think its analysis and re-allocate the burden of the risk to the PUDs.

No Net Impact (NNI) is Misrepresented  
in the DEIS and the Permits

Yakama adopts its May 1, 2001 comments on this issue at 14-16. Further, Yakama adopts by reference the discussion and analysis found in the previous CRITFC comments filed on the DEIS, and those filed by CRITFC in response to this notice.

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Inconsistencies Between QAR and DEIS Call DEIS into Question

The following paragraph is a direct quote from the comments of SOS on this issue, found in its May 1, 2001 comments on the DEIS.

The DEIS relies on the Quantitative Analytical Report (QAR) to assess the impacts of implementing the survival standards and tributary habitat improvement measures in the HCPs. NMFS' reliance on the QAR analysis is misguided for several reasons. First, the QAR "assumed that the survival improvements called for at the hydro projects, and through off-site mitigation, occur instantaneously," when in fact, as the DEIS notes, the survival

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benefits from the measures in the HCPs may not be realized for years. DEIS at 4-11. The QAR also assumes that Grant County PUD's Priest Rapids Project has achieved a 95 percent juvenile survival standard, similar to the juvenile dam passage survival standard called for in the HCPs. However, the DEIS provides no support for this assumption. As discussed above, the QAR also fails to adequately assess the proposed hatchery supplementation program. Finally, the QAR incorporates the survival improvements called for in the Federal Columbia River Power System Biological opinion, even though such standards are not currently being met. The QAR relies upon unsupportable assumptions contrary to the requirement that NMFS articulate a rational connection between its findings and the available facts. Inconsistencies between the QAR and available facts call into question NMFS' reliance on the analysis to draw any conclusions about the adequacy of the HCPs.

The above comments were made in May of 2001. At that time, the parties were aware that a "revised QAR" was in the works, with the understanding that it was intended to answer some of the questions and uncertainties found in the initial document. As of the date of these comments, that document remains unfinished and is not available for review. In spite of the lack of that crucial element in this 50-year permit process, NMFS asserts that it intends to finalize the EIS, obviously ignoring the defects in its own analysis of the proposed action. This hardly meets the TVA, supra, test of erring on the side of the resource, or practicing "institutionalized caution" as required by NEPA. NMFS should re-analyze this decision and delay any further action until the revised QAR is final and available for review and comment.

The "No Surprises" Policy is Inappropriate  
in a Fishery Based HCP

Yakama adopts its May 1, 2001 DEIS comments at Page 14 and the comments of SOS made on this issue in its May 1, 2001 DEIS comments, and the comments of CRITFC. See also discussion in trust responsibility section infra.

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The DEIS and the Permit Applications Lack Meaningful  
Analysis of Survival, Recovery and Rebuilding

Under Section 10 of the ESA, an HCP must explain the impact that the proposed take will have on listed species. 16 U.S.C. § 1539(a)(2)(A)(i). See also 50 C.F.R. §§ 17.22(b)(1); 17.32(b)(1); 222.22. Under the National Environmental Policy Act (NEPA), agencies are required to take a "hard look" at the consequences of their actions before acting. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 249 (1989). This requires more than broad or general statements about risk, especially when more detailed

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information could be provided. See Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998).

The Yakama Nation believes that the DEIS fails to take the required hard look at impacts on anadromous fish and other trust resources. Neither the HCPs nor the DEIS present adequate quantitative detail of how listed species would be impacted by the HCPs. Furthermore, the DEIS does not do so under the other alternatives. The DEIS mentions the Quantitative Analysis Report (QAR) conducted by the NMFS, but does not incorporate the analysis into the alternatives. The reviewer of the DEIS is left without any idea of how each of the alternatives actually compares in terms of survival and rebuilding benefits.

In the discussion of the No Action alternative, the DEIS states, "[e]xisting measures however, may not prevent the extinction of listed species." DEIS at 2-49. However, the discussion of the other alternatives fails to provide analysis of whether or not they will be an improvement and not also lead to extinction. The DEIS states that implementation of the HCPs would result in an increase in survival levels, but fails to explain what that means in terms of ESA standards or FPA requirements. DEIS at 4-39. According to NMFS' own data in the QAR, measures in addition to those set forth in the HCPs will be necessary for recovery, yet such information is not adequately addressed or analyzed in the comparison of alternatives. There is no suggestion in the QAR or the permits that NMFS can and should proceed under the FPA and Section 7 until that information is available, rather than agreeing to lock in an agreement for a 50-year period. The QAR report at ii states, "Even under the most optimistic scenarios ... regarding future survival rates and the effectiveness of supplementation, additional survival improvements beyond those projected for the draft HCP actions would be necessary to achieve extinction risk/recovery criteria." This information should be analyzed in the DEIS. This statement in the QAR highlights the need for delay in these permits to allow for the completion of basin-wide studies in order to determine what coordinated steps are necessary to truly return fish to harvestable populations. As noted, NMFS can proceed with Section 7 and FPA protection in the interim.

The DEIS also does not account for the QAR's statement that meeting the HCP standards and off-site mitigation "would fall short of meeting survival and recovery criteria under the assumptions that 1980-present conditions will continue." QAR at iii. Therefore, according to the QAR, additional measures are going to be required for recovery, but such measures are not required or allowed by the HCPs. If something more than the HCPs is required, then Alternative 2 would be the only avenue for providing it. The DEIS must address this omission and include meaningful analysis across

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all of the alternatives.

As NMFS provides in the "Recovery" section of the NMFS VSP, the NMFS, States, Tribes and many other stakeholders have an interest in the recovery of salmon population to the level that the populations can support "sustainable harvest or other 'broad sense' recovery goals." NMFS VSP at 34. NMFS provides that where a certain level of harvest may have an affect on the population's sustainability, NMFS could use VSP guidelines "to help determine the population abundance, productivity, diversity, and structure that would be required." *Id.* The Yakama Nation would accordingly submits that NMFS must take into consideration the factors that led to the initial decline of the salmon and provide analysis that examines the impact that the various alternatives would have on the sustainability of the salmon populations and the ability of such populations to meet broad (beyond mere ESA) recovery goals.

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#### The DEIS Does Not Adequately Address or Analyze Cumulative Effects

Under NEPA, an environmental impact statement must contain consideration and analysis of cumulative effects. Cumulative impacts are effects from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

The Yakama Nation, in its Scoping Comments on the HCPs, asked for such consideration and analysis, but the DEIS does not adequately accomplish this. *See* DEIS at 4-6--4-47. The Tribe believes that the NMFS should have considered factors for decline throughout the entire life histories of each species, including effects that fall outside of the geographic scope of Alternative 3. Furthermore, the analysis should have included cumulative and synergistic impacts from the Federal Columbia River Power Systems operations and all five of the Mid-Columbia Public Utility District Dams (Wells, Rocky Reach, Rock Island, Priest Rapids, and Wanapum). Additionally, the results presented in the DEIS reinforce the Yakama Nation's concerns that an inability to enforce operations at federal dams or to impose environmental conditions are assumed in the QAR model. Therefore, we fear that the effectiveness of the HCP measures cannot be assured. In order to effectively give consideration to cumulative effects as required by NEPA, the Tribe believes that the NMFS must provide a review and analysis of no less than what we requested in our Scoping Comments.

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### The DEIS Lacks a "Reasonable Range of Alternatives"

The NEPA requires that environmental review contain a reasonable range of alternatives. See 40 C.F.R. §§ 1502.14. Agencies are required to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4322(2)(E). The discussion of the alternatives is the "heart" of the NEPA process. 40 C.F.R. § 1502.14.

The DEIS offers as its only alternatives a general Section 7 process and the HCPs (along with the No Action alternative, which we address below). The Yakama Nation does not find this to be a reasonable range of alternatives to meet NEPA requirements. The Yakama Nation asked for additional alternatives in the Tribe's Scoping Comments, specifically that the NMFS include as alternatives three options that cannot realistically be pursued under the HCPs: drawdown, dam removal and non-power operations. The DEIS states that these alternatives do not merit further consideration, but offers no satisfactory explanation for why these alternatives were not given analysis. DEIS at 2-45--2-48. This deficiency must be remedied and proper analysis be included in the environmental review, particularly in light of the NMFS' findings, as reported above, that the HCPs fall short of what would be required for ESA survival and recovery, let alone what is required under the United States' trust obligation to the Tribe.

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### The No Action Alternative Is Inadequate

The NEPA requires that a No Action alternative be included in an Environmental Impact Statement. See 40 C.F.R. § 1502.14(d). However, the way in which the No Action alternative is presented in the DEIS misrepresents the existing situation and sets it up so that it cannot be given serious consideration. For example, the discussion of the No Action alternative completely omits statutory authorities at relicensing. This is particularly key relative to the Rocky Reach project, which is currently going through the relicensing process. In addition, Section 1.7.3.1 of the DEIS references the settlement agreements under the Mid-Columbia proceeding, but the analysis of the No Action alternative does not fully describe the settlements, cross-reference them throughout, or analyze the level of species protection provided through the settlement agreements and coordinating committees. NMFS should reframe the No Action alternative so that it accurately represents the actions that may be taken under the existing license, settlement agreements and statutory authorities.

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By failing to take into consideration the activities of the coordinating committees under the settlement agreements, the No Action alternative and the DEIS in general also fail to adequately consider the interests of the Tribe, to which the NMFS has a trust responsibility. The Tribe is a party to the Mid-Columbia proceeding and has a place in the coordinating committees, which allows the Tribe to exercise its involvement in co-management of the Tribe's trust resources. If the HCPs are put into place, with the idea that the HCPs will supersede these settlement agreements, the fishery-related signatories to the HCPs become a new coordinating committee. See DEIS at 1-9, 1-15. However, if the Tribe is not able to sign the HCPs due to a lack of bargained-for consideration and assurances from the federal government, then the Tribe's participation in co-managing its trust resources may be affected. This should be addressed in the No Action alternative and factored into the comparison of the other alternatives.

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Section 10 Treatment of FERC Licensed  
Facilities is Inappropriate

The projects in question are federally licensed hydro dams. Section 7 of the ESA and NMFS HCP Handbook make it crystal clear that projects which are the subject of federal activities are not eligible for Section 10 treatment. Throughout the DEIS and the permits, it is stressed that these projects are federally licensed and that the purpose of the permits is to satisfy those federal relicensing requirements. Under such a situation, an Incidental Take Statement rather than the proposed Incidental Take Permit is the appropriate vehicle for ESA protection. 16 U.S.C. § 1536(b) and (c). Accordingly, the Section 10 permit process must be denied.

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Throughout the process, NMFS has acknowledged an obligation to conduct a Section 7 process. However, NMFS intends to approve the HCPs prior to initiation of that process, which renders it virtually meaningless, as the provisions of the permits will tie NMFS' hands in that consultation. Accordingly, at the very least, the Section 7 consultation must occur prior to the approval of the HCPs. To do anything else will simply render the Section 7 consultation meaningless.

In Evaluating the Provisions of the HCPs, NMFS Must Take Into  
Account its Trust Responsibility to Yakama

As has been mentioned through these comments, the landscape under which these permits must be reviewed has changed dramatically since the initial DEIS was issued and comments made. The DEIS, as Yakama noted in its comments, was conducted solely on the basis that all participants would ultimately be parties to the agreements. That

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is not the case at this juncture, as Yakama has chosen not to sign the agreements in their current form. As is noted throughout these comments, that decision may have dramatic impacts upon Yakama's ability to continue to participate in management of resources in which it holds a treaty secured right.

Both NMFS and USFWS, as federal agencies, have a fiduciary trust obligation to Indian Tribes, which must be carried out according to a strict fiduciary standard. See United States v. Mason, 412 U.S. 391 (1973); Seminole Nation v. United States, 316 U.S. 286 (1942); Felix Cohen, Handbook of Federal Indian Law 225 (1982). These trust obligations apply to federal agency actions that affect trust resources. See, e.g., Covello Indian Community v. FERC, 895 F.2d 581, 586 (9th Cir. 1990). The agencies thus have a required duty to protect, maintain and enhance the Yakama Nation's treaty fishing rights and the fish on which the Tribe relies.

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Both agencies also have significant responsibilities to Yakama in the context of the Secretarial Order 3206. The fish that are the subject of these HCPs constitute "trust resources" as the term is defined in the Order and, accordingly, NMFS is required to fully implement the terms of the Order in its analysis of the permit applications. The current DEIS is silent on these issues and must be modified in a supplemental document in order to fulfill the agencies' responsibilities.

The trust responsibility triggered in at least the following respects regarding these agreements:

1. The cancellation of the Mid-Columbia FERC process and the Wells and Rock Island agreement will deprive Yakama of its "seat at the management table." This will significantly impact the Tribe's ability to manage its trust resources. Inclusion of this provision, if implemented, prevents the Tribe from continuing its effective management policy in the Mid-Columbia. Forcing the Tribe to choose to sign these agreements or lose its "seat at the table" does not meet NMFS' trust responsibility.
2. The agreements provide for "No Surprises" to the PUDs even if the listed stocks are not rebuilding, unless NMFS can prove that the PUDs are a "significant factor" in the failure to rebuild. No similar assurances are provided to the Tribes in their fisheries. There is a very real potential that a failure to rebuild in the Mid-Columbia, in which NMFS cannot meet the "significant factor" burden of proof, will fall upon the shoulders of tribal fisheries. Neither the agreements nor the DEIS discuss this issue or propose to provide any remedy to tribal fisheries under these circumstances. Yakama argued

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for a "tribal no surprises" provision in the agreements which NMFS denied. There should now be an analysis of that denial in light of NMFS' and USFWS' trust responsibility.

3. Tribal fisheries currently being constrained by the status of Mid-Columbia stocks. The agreements make no provision for recovery of those stocks to harvestable levels and, accordingly, may or may not benefit the tribal fisheries. Instead, NMFS, in the agreements, is satisfying both its ESA and FPA responsibilities by balancing the needs of power production against protection of trust resources. This violates its trust responsibility. Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252; Northern Cheyenne Tribe v. Hodel, 842 F.2d 24 (see District Court opinion).

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4. The agreements fail to guarantee the continuation of the 7% hatchery component. While this issue may be somewhat alleviated by NMFS' ability to require other measures, it is unclear as to whether these measures are adequate and if they will be provided on a timely basis.

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NMFS must analyze its actions from this perspective in a supplemental document as it has failed to adequately discuss it initially. Yakama has not had the opportunity to comment on how NMFS intends to fulfill its trust responsibility on the "government-to-government" basis required by the Secretarial Order. This is particularly true with regard to how NMFS and the USFWS will deal with their trust responsibility under Sections 3(C), (D) and (E) of the Order as applied to these circumstances. Promoting an HCP which allows cancellation of the Mid-Columbia agreements, thereby shutting out tribal recovery participation, flies directly in the face of the cited provisions. NMFS must provide such an opportunity before taking any action.

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Further, in analyzing its responsibilities, NMFS may not balance the interests of other parties against tribal interests, nor take actions contrary to tribal interests to accommodate the interests of those parties. Northern Cheyenne v. Hodel, supra.

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#### NMFS Must Issue a Supplemental DEIS

40 C.F.R. § 1502.9 provides that:

- (c) Agencies:
  - (1) Shall prepare supplements to either draft or final environmental impact statements if:
    - (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

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- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. (Emphasis added).

Both circumstances apply here. As the new CRITFC comments reflect, the HCP documents now being reviewed have "substantially changed" the 91%-95% survival standard set forth in the previous drafts. As CRITFC reflects, this alternative may have significant impacts on NNI, particularly as regards adult survival. This is a substantial change from the previous standards and requires additional review and comment in a supplemental DEIS.

By far, the most implications came under Section 1502.9(c)(2) regarding "new circumstances." The first of those is the fact that not everyone is signing the agreements. As noted above, this has major repercussions on many of the agreement terms that are substantive in nature. The largest issue is who will sit at the table and make decisions regarding the resources in question. This has major implications for the continuation of production, the species produced, the place released and a number of other factors.

The implications of NMFS' responsibility to Yakama and Umatilla for protection of their rights in the Mid-Columbia proceeding and settlement agreements also may significantly alter how NMFS must act under the agreements. This has not been discussed anywhere and has major implications regarding the Mid-Columbia resource.

As the CRITFC comments reflect, a major new study regarding the delayed mortality impacts of mechanical bypass has been completed since the DEIS was produced. The impact of this study on the installation of the Rocky Reach bypass without further study or testing has not been discussed or commented on in any manner.

These are major issues of significance that were not contained in the previous draft DEIS, and have come about since its issuance. They clearly support a request for a supplemental DEIS.

#### Conclusion

As noted, Yakama incorporates by reference its previous comments together with all comments of CRITFC and SOS on these issues. It is readily apparent that there has been a substantial change in both the proposed action by changes in the survival standard, and significant changes in circumstances and information since issuance of the DEIS.

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Yakama urges NMFS, in the first instance, to issue a supplemental DEIS which analyses these new issues and affords Yakama an opportunity to comment on them. Yakama further urges NMFS to adopt its suggestions in these comments regarding initiation of Section 7 consultation with FERC, which would later require a decision as to whether Section 10 treatment here is appropriate, and, if so, how to modify these agreements to include reasonable terms and protection of tribal interests through exercise of NMFS' trust responsibility.

Sincerely,



Tim Weaver

TW/pm

Yakima Nation (YIN)

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1	Misc. Comments	25	58
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<sup>1</sup> See Appendix C